U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 18 September 2007

BALCA No.: **2007-INA-00023**
ETA Case No.: D-05010-14824

In the Matter of:

POLEXSPORT, INC.,
Employer,

on behalf of

BARTOSZ NIEDZIALKOWSKI,
Alien.

Certifying Officer: Jenny Elser
Dallas Backlog Elimination Center

Appearances: Donald E. Puchalski, Esquire
Chicago, Illinois
For the Employer and the Alien

Before: **Chapman, Wood and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from the Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of

the Code of Federal Regulations ("C.F.R.").[1] We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in the Appeal File ("AF"), and any written arguments. 20 C.F.R. § 656.27(c).

BACKGROUND

The Employer submitted this application for permanent alien labor certification for the position of Electronics Technician. (AF 86). The CO issued a Notice of Findings ("NOF") on April 17, 2006, stating the intent to deny the application based on five grounds, two of which were later successfully rebutted. The remaining grounds for denial were that the Employer did not submit an acceptable recruitment report stating the lawful job-related reasons why the U.S. applicants were rejected; that the Employer did not show that it had made a *bona fide* job recruitment effort by providing proof of contact with the U.S. applicants (AF 22); and that the Alien did not meet the minimum requirements of the job before he was initially hired by the Employer, since the Alien received all of his relevant experience while working for the Employer. (AF 24). The CO informed the Employer that it could rebut these findings by providing documentation to show that the position the Alien currently holds with the Employer is dissimilar to the position for which labor certification is being sought; that the job existed before the Alien was initially hired; and also by submitting a revised recruitment report that included proof of contact with the applicants and the lawful, job-related reasons for not hiring each applicant. (AF 25).

The Employer submitted a rebuttal to the CO's NOF on May 17, 2006. The Employer stated that the job for which labor certification is being sought is distinct from the job that the Alien currently holds. (AF 14). The Employer submitted a copy of an identical labor certification for the same position for another alien, which had been

[1] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

granted by the CO (AF 15), and copies of letters sent to the U.S. applicants asking them to respond. Also attached to the rebuttal were affidavits from the Alien stating that he does have two years of experience for the job (AF 90), and from the Employer's President stating that letters were sent out to the applicants and that no applicant responded or contacted the Employer. (AF 92).

On February 12, 2007, the CO issued a Final Determination denying the application. The CO found that the Employer failed to submit any actual proof that the letters were mailed to the applicants; that the position being applied for is dissimilar to the position that the Alien holds now; or that the job being applied for existed before the Alien was hired. The CO found that the evidence submitted by the Employer was insufficient to rebut the findings in the NOF. (AF 5).

The Employer requested review by BALCA in a letter received by the Dallas Backlog Elimination Center on March 13, 2007. The Employer observed that an identical application filed for another alien was granted by the CO, and argued that to deny one application yet grant another is an "abuse of discretion" by the CO. (AF 99). Also attached to the request for review was a new affidavit from the Employer's President, reiterating that the two positions mentioned above are dissimilar, that the Employer mailed out the recruitment letters to the U.S. applicants via regular mail as is the routine for their business, and that no applicant responded. (AF 94).

In response to the Employer's request for review, the matter was forwarded to this Board on May 10, 2007. The Board issued a Notice of Docketing on May 31, 2007. No briefs or statements of position were received.

DISCUSSION

The Employer failed to show that it completed the recruitment of U.S. applicants in good faith when it failed to provide proof of contact with the applicants. Recruitment in good faith is regulated by 20 C.F.R. § 656.20(c)(8), which requires that the job opportunity has been and is clearly open to any qualified U.S. worker. The regulation at 20 C.F.R. § 656.1 states that the purpose of Part 656, under section 212(a)(5)(A) of the Immigration and Nationality Act (INA), is that certain aliens may not obtain a visa for permanent employment unless it is determined that "[t]here are not sufficient United States workers, who are able, willing, qualified and available at the time of application … and at the place where the alien is to perform the work."[2]

In a February 16, 2004 letter to the Illinois Department of Employment Security, Alien Certification Unit, the Employer stated that it sent recruitment letters to the referred applicants and that "no individual applied for the job." (AF 50). Copies of these letters addressed to the applicants with the date of February 2, 2004 were attached. However, this does not constitute proof that the letters were actually mailed on that date or that the applicants received them. In the rebuttal to the NOF, the Employer's representative merely stated that the "petitioner sent a letter to the U.S. applicants … No applicant responded to this letter. No applicant contacted the petitioner." (AF 15). The CO, however, requested in the NOF that the Employer provide actual documentation of its recruitment effort, such as certified mail, return receipt requested. (AF 25). The Employer failed to submit any such documentation.

In M.N. Auto Electric Corp., 2000-INA-165 (Aug. 8, 2001)(en banc), the Board heard a similar case in which the issue arose that the employer did not provide proof of contact with U.S. applicants. In M.N. Auto Electric Corp., the Board stated that while the CO should not disregard written assertions of the employer, the employer carries the

[2] Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. See H.C. LaMarche Enterprises, Inc., 1987-INA-607 (Oct. 27, 1998).

burden of proof showing that it did complete the recruitment requirements in good faith. In M.N. Auto Electric Corp., (*supra*). The Board said:

> We hold that a CO may not require an employer to use certified mail, return receipt requested, when contacting U.S. applicants. Rather, an employer must be given an opportunity to prove that its overall recruitment efforts were in good faith, even if it cannot produce certified mail return receipts to document its contacts with U.S. applicants. Moreover, a CO may not summarily discard an employer's assertions about what efforts were made to contact applicants. Employers should be cognizant, however, that although a written assertion constitutes documentation that must be considered under *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*), a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof.

While the Employer's comments in the instant case stating that it did mail the letters are a form of documentation, without supporting evidence they are entitled to little evidentiary weight. The Employer had the responsibility to make sure that it could provide a basis for its statements.[3] Since the Employer did not provide any documentation that its letters were actually sent to or received by the applicants, the Employer did not show that it had completed its recruitment efforts in good faith.

Furthermore, in the NOF, the CO found that all of the Alien's relevant experience was gained while employed by the Employer. The Employer did not prove that the Alien had the experience necessary *prior* to being hired by the Employer. The CO gave the Employer the option to rebut this finding by "submitting evidence that the alien gained the required experience working for the employer in jobs which were not similar to the job for which labor certification is sought" and "demonstrating the job [for which labor certification is being sought] as currently described existed before the alien was hired." (AF 25). In Delitizer Corp. of Newton, 1988-INA-482 (May 9, 1990)(en banc), the Board held that:

> [W]here the required experience was gained by the alien while working

[3] Moreover, in some cases, the Board has found that reasonable efforts to contact U.S. applicants may require the Employer to use more than a single type of attempted contact. See Diana Mock, 1988-INA-255 (Apr. 9, 1990).

> for the employer in jobs other than the job offered, the employer must demonstrate that the job in which the alien gained experience was not similar to the job offered for certification. Some relevant considerations on the issue of similarity include the relative job duties and supervisory responsibilities, job requirements, the positions of the jobs in the employer's job hierarchy, whether and by whom the position has been filled previously, whether the position is newly created, the prior employment practices of the Employer regarding the relative positions, the amount or percentage of time spent performing each job duty in each job, and the job salaries.

(Footnotes omitted).

In its response to the NOF, the Employer asserted that the "[p]etitioner is petitioning the beneficiary for the position of Technician. The occupational code for this position is 003.161.014. The job requires two years of experience as a technician or two years of experience as a cellular phone programmer. This occupation is a separate and distinct position with different job duties than a technician." (AF 14). However, the position which the Alien currently holds with the Employer and the position for which the labor certification is being sought both share the title of "Technician," and the job duties listed for each position are identical. (AF 86, 87). These two positions appear to be indistinguishable, and the Employer has provided no proof to the contrary. Thus, the Employer has not proved that the position in which the Alien gained the relevant experience was significantly dissimilar to the job for which labor certification is being sought; in fact, the two positions appear to be the same.[4]

The Employer also failed to show that the job position existed before the Alien was hired. The CO requested such evidence as organizational charts or payroll records to show the existence of the position. (AF 25). In a March 12, 2007 affidavit, the Employer's President stated that the "position of Technician and Cellular Phone Programmer existed as of the date our business operated and existed prior to the date [the

[4] The Employer also argues in its rebuttal to the NOF that the "same case for a different beneficiary was granted certification." (AF 14). However, the CO and the Board are not bound by the finding of the CO for another application. See Paralegal Priorities, 1994-INA-117 (Feb. 1, 1995), which states that "[e]very application for labor certification is different; it has its own set of facts and issues. Therefore, the submission of another employer's approved application does not set any precedent to which the CO is bound. Certainly, the Panel is not bound by a decision made by a CO in a different case." See also Tedmar's Oak Factory, 1989-INA-62 (Feb. 26, 1990).

Alien] was hired." (AF 95). However, the Employer did not provide the requested documentation to support its statement. See Gencorp, *supra* (if the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it). The Employer was reminded by the CO in the NOF that it bears the burden of proof, but it still failed to submit the requested documentation. Thus, the Employer did not prove that the Alien met the requirements for the job opportunity prior to being initially hired by the Employer.

In sum, the Employer did not prove that it had conducted its recruitment efforts in good faith since it did not produce evidence showing that it had contacted the applicants and rejected them solely for lawful job-related reasons. Nor did the Employer show that the Alien met the requirements of the job prior to being hired by the Employer, or that the experience gained by the Alien during his employment with the sponsoring Employer was significantly dissimilar. Accordingly, we find that the CO properly denied certification.

ORDER

Based on the foregoing, **IT IS ORDERED** that the Certifying Officer's denial of labor certification in the above-captioned matter is **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of Alien Labor
Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of

its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.